IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75- 75-844

EMERSON SUSENKEWA, ET AL., *Petitioners,*

v.

THOMAS S. KLEPPE, Secretary of the Interior, ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Emerson Susenkewa and sixty (60) other Hopi Indians petition for a writ of certiorari to review

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[1] This case was filed *sub nom.* Lomayaktewa v. Morton. It was decided in the court of appeals *sub nom.* Lomayaktewa v. Hathaway. As noted by the court of appeals (App. 2a), Starlie Lomayaktewa, originally the first named of the 62 Hopi Indian plaintiffs, dismissed his appeal prior to oral argument. Hence, Emerson Susenkewa, the second named Hopi plaintiff, is the lead petitioner here. We have substituted the new Secretary of the Interior, Thomas S. Kleppe, for the former Secretary Hathaway in accordance with Rule 48(3) of Supreme Court Rules.

the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-6a) [2] is reported at 520 F.2d 1324 (9th Cir. 1975). The district court's "Order of Dismissal" (App. 7a-9a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 1975. A timely petition for rehearing was denied on September 18, 1975 (App. 6a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Should an Indian tribe be regarded as an indispensable party in an Administrative Procedure Act suit brought by individual Indians invoking rights under the tribal constitution that challenges the legality of the Secretary of the Interior's approval of a mining lease between the tribe and a coal company?

2. Does sovereign immunity preclude joinder of sovereign entities before sovereign immunity has been raised as a defense?

3. Does sovereign immunity preclude judicial review of the actions of tribal officials or tribal entities that are allegedly in excess of their authority under the tribal constitution?

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[2] "App." refers to the separately bound appendix to the petition for a writ of certiorari.

STATUTES AND RULES INVOLVED

Administrative Procedure Act

The relevant portions of the Administrative Procedure Act, 5 U.S.C. §§ 702 and 706, provide:

5 U.S.C. § 702. Right of review

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

5 U.S.C. § 706. Scope of review

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> . . . .
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> . . . .
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> . . . .

Indian Reorganization Act

Section 16 of the Indian Reorganization Act, Act of June 18, 1934, 48 Stat. 984, 987, codified at 25 U.S.C. § 476, provides:

> Organization of Indian tribes; constitution and by-laws; special election
>
> Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and by-laws, when ratified as aforesaid and approved by the Secretary of the Interior, shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and by-laws may be ratified and approved by the Secretary in the same manner as the original constitution and by-laws.
>
> In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council

> of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress.

Indian Mineral Leasing Act

25 U.S.C. § 396a. Leases of unallotted lands for mining purposes; duration of leases

> On and after May 11, 1938 unallotted lands within any Indian reservation or lands owned by any tribe, group, or band of Indians under Federal jurisdiction, except those specifically excepted from the provisions of this section by section 396f of this title, may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians, for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities.

Rule 19, Fed. R. Civ. P.

Rule 19 of the Federal Rules of Civil Procedure, as amended effective July 1, 1966, provides:

> Rule 19. Joinder of Persons Needed for Just Adjudication
>
> (a) PERSONS TO BE JOINED IF FEASIBLE. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence

may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) DETERMINATION BY COURT WHENEVER JOINDER NOT FEASIBLE. If a person as described in subdivision (a) (1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) PLEADING REASONS FOR NONJOINDER. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons described in subdivision (a) (1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) EXCEPTION OF CLASS ACTIONS. This rule is subject to the provisions of Rule 23.

Hopi Constitution and By-laws

The Hopi Constitution and By-laws are reprinted in the separately bound Appendix to this petition at pp. 30a-45a. The particular provisions that are most relevant to this proceeding are cited, described or quoted *infra* at pp. 9-14. The Constitution has a higher status than Departmental regulations and was specifically made binding on all officers and employees of the Interior Department. (App. 45a.) It can be amended only by a majority vote of the adult members of the Hopi Tribe. 25 U.S.C. § 476.

STATEMENT OF THE CASE

A longer than usual description of this case is necessary because of the cursory and inaccurate treatment it received in both opinions below. As this Court emphasized in its leading Rule 19 case following the 1966 amendments, *Provident Tradesmens Bank & Trust Co.* v. *Patterson,* 390 U.S. 102 (1968), application of Rule 19(b)'s "equity and good conscience" test requires careful scrutiny of the circumstances of each case.

A. Background

The setting of this case starts with conditions when the Indian Reorganization Act (IRA) was enacted in 1934. The IRA, 25 U.S.C. §§ 461 *et seq.,* explicitly repealed the then discredited allotment policy and was intended to rejuvenate Indian tribal governments, many of which had been destroyed by prior federal policy and the effects of allotment. Section 16 of the Act, 25 U.S.C. § 476, provided a mechanism for tribes to adopt a constitution and by-laws under the auspices and subject to the approval of the Secretary of the Interior.

Of all the nation's Indian tribes, the Hopis probably had the least need for the IRA. The Hopi Reserva-

tion, set aside by Executive Order in 1882, had never been allotted. Spared of allotment, insulated from most contact with whites, surrounded by Navajos, and tied together by their incredibly strong and all-pervasive religious way of life, the Hopis remained then and still remain the least assimilated of all American Indians. (App. 60a.) They have always maintained their traditional governmental structure under which authority was exercised by the religious leaders of the self-governing villages, comparable in some respects to the city-states of ancient Greece. Prior to 1936, there had never been any central entity corresponding to the Hopi Tribal Council.

Nonetheless, exemplifying the perversity that threads its way through so much federal Indian policy and law, it was the Hopis' fate to become a test case for the new policy. If the Hopis could be convinced to adopt the IRA, according to the reasoning in official circles, so could all of the other Indian tribes.

Mr. Oliver LaFarge, an official of the Bureau of Indian Affairs from Washington who later founded the Association on American Indian Affairs, was assigned the delicate task of negotiating the contents of the new, written constitution with the Hopis. After several weeks on the Reservation, on August 28, 1936, he wrote a memorandum to the Commissioner of Indian Affairs which accompanied and explained a draft of the proposed constitution (App. 52a-60a.) This communication is vitally important because it forms the backdrop to this litigation. Mr. LaFarge wrote (App. 52a-53a):

> About 80% of these Indians follow the Hopi religious and civil establishment today, and desire to continue so doing. They will accept nothing which goes contrary to it. Hence it is necessary

> so to write the document that the old Hopi organization is recognized and protected, and at the same time, so that when the various villages reach the point at which their majorities will wish to take up more modern methods, they will be free to do so.

Mr. LaFarge went on to say:

> In the experience of these Indians, the white man is hostile to the Hopi culture and all that goes with it. Ultimate adoption or rejection of the proposed Constitution will depend on whether it is clearly not inconsistent with that culture. When it is returned from Washington, it will be very carefully examined for changes. The white man, they say, "talks very cleverly to the Hopis. Then he goes back to Washington and does just the other way. Every time the Hopis lose something and the promise is broken."

B. The Hopi Constitution

With minor modification, the constitution proposed by Mr. LaFarge was presented to the Hopis and, following a disputed election in October 1936, its adoption was certified and approved by the Secretary of the Interior. All of the plaintiffs' claims are founded upon its provisions which, as we shall now show, were carefully drafted to safeguard the traditional Hopi way of life until the people of the villages should vote affirmatively to replace the traditional governments with more modern forms of organization.

Article III, section 1 of the Constitution provides that the "Hopi Tribe is a union of self-governing villages sharing common interests and working for the common benefit of all" and then lists the nine Hopi villages. (App. 32a.) Article III, section 2, specifically preserves certain powers of the villages. Sections 3

and 4 of Article III are critical to the issues presented in this case. Section 3 provides that each village shall determine its own form of organization but that until it decides to organize in another manner it "shall be considered as being under the traditional Hopi organization, and the Kikmongwi of such village shall be recognized as its leader."[3] (App. 32a.) Section 4 sets forth the procedure by which, as Mr. LaFarge had put it, the villages could elect to take up more modern methods. Proposed village constitutions could be drawn up, circulated and made known to the members of the village, and then voted upon at the request of the village Kikmongwi or 25% of the village's voting members. The constitution would be deemed adopted if not less than half of the voting members of the village cast their votes and a majority of those voting accepted it. Section 4 goes on to say: "The village Constitution shall clearly say how the Council representatives and other village officials shall be chosen, as well as the official who shall perform the duties placed upon the Kikmongwi in this Constitution." (App. 33a.) *In the 39 years that the Hopi Constitution has been in effect, only one of the Hopi villages, Upper Moencopi, has opted to replace the traditional form of government through the procedure set forth in Article III, section 4.* (R.O.A., Vol. 3, pp. 558 and 750.)[4]

Article IV of the Hopi Constitution defines the makeup of the Council. The Council is to consist of

[3] The Kikmongwi is the traditional religious leader of the village whose position is inherited. *See* App. 54a.

[4] "R.O.A." refers to the four volume record on appeal which we have requested the clerk of the Ninth Circuit Court of Appeals to certify and transmit to this Court. The fifth volume, consisting of two transcripts of proceedings, has not been included.

representatives of the various villages. Demonstrating again the deference to and protection of the traditional way of life, Article IV, section 4 provides that "[r]epresentatives shall be recognized by the Council only if they are certified by the Kikmongwi of their respective villages." (App. 34a.)

Article VI (App. 35a) deals with the powers of the Tribal Council. In a contemporaneous (1937) opinion declaring invalid one of the first ordinances enacted by the Hopi Tribal Council, the Solicitor of the Interior Department stated that the powers of the new Council were to be "as close to the legal minimum as possible." (App. 50a.) Under Article VI, section 4 of the Hopi Constitution, all rights and powers of the Hopi Tribe which are not expressly delegated to the Tribal Council are retained by the Tribe and may be exercised through the adoption of appropriate by laws and amendments. (App. 38a.) Article VI, section 3 provides that the Tribal Council may exercise such further powers as might in the future be delegated to it by the members of the Tribe, or by the Secretary of the Interior, "or any other duly authorized official or agency of the State or Federal Government." (App. 38a.)

Secretary of the Interior Harold L. Ickes approved the Hopi Constitution and By-laws by a proclamation dated December 19, 1936. (App. 45a.) Secretary Ickes directed that:

> All rules and regulation heretofore promulgated by the Interior Department or by the Office of Indian Affairs, so far as they may be incompatible with any of the provisions of the said Constitution and By-laws are hereby declared inapplicable to these Indians.

> All officers and employees of the Interior Department are ordered to abide by the provisions of the said Constitution and By-laws.

The constitution remained in its original form until certain amendments, not material to this action, were adopted in 1969. (App. 46a-49a.)

C. Description of this Litigation

Plaintiffs originally brought suit in the United States District Court for the District of Columbia against the Secretary of the Interior and the Peabody Coal Company seeking to set aside the Secretary's approval of a 1966 lease (hereinafter referred to as "the Black Mesa lease") entered into between the Hopi Tribal Council and defendant Peabody's predecessor in interest.[5] (The complaint, together with its exhibits, is reproduced at pp. 10a-51a of the separately bound Appendix to this Petition.) The Secretary's approval of the lease is required by statute, 25 U.S.C. § 396a. Specifically invoking the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.*, the plaintiffs claimed that the Secretary's approval was arbitrary, capricious, an abuse of discretion, not in accordance with law and in excess of his statutory authority. No specific relief was sought against defendant Peabody. The intervenors are six power com-

[5] The United States District Court for the District of Columbia ordered this case transferred to the Federal District Court in Arizona. Plaintiffs' petitions to the United States Court of Appeals for the District of Columbia Circuit and to this Court seeking to reverse this transfer order were unsuccessful. 409 U.S. 843.

panies who have contracted with defendant Peabody for Black Mesa coal.[6]

The plaintiffs are approximately 60 members of the Hopi Tribe, who include the Kikmongwis and other religious leaders from all of the Hopi villages.[7] Their complaint sets forth three causes of action, all of which are predicated upon provisions of the Hopi Constitution designed to protect the traditional Hopi way of life. None of the rights asserted by the plaintiffs arises out of, or is in any way affected by or dependent on, the terms or provisions of the lease.

The first cause of action (App. 19a-21a) alleges, in substance, that the Secretary of the Interior's approval of the Black Mesa strip mining lease is invalid and must be set aside because the Hopi Tribal Council

[6] The court of appeals incorrectly states (App. 2a) that this action was brought to void the lease. It is an action under the Administrative Procedure Act (that vital fact is not mentioned in the decision below) to set aside the Secretary's approval of the lease. No relief is sought with regard to the underlying lease.

The court of appeals also erred in describing the term of the lease as ten years. (App. 2a.) The statute, 25 U.S.C. § 396a, *supra*, p. 4, authorizes leases of tribal lands "for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities." The lease tracks the statutory language. (R.O.A., vol. 2, p. 402.) It is now anticipated that coal will be extracted for at least 35 years from 1971, or until 2006. (R.O.A., vol. 1, pp. 208-209.)

[7] The court of appeals gratuitously and somewhat hostilely comments that the plaintiffs number 62 of a tribe of more than 5,000 Hopi Indians. (App. 2a.) We do not know of any rule that requires the Hopi plaintiffs, or anyone else, to seek out, identify and name as co-plaintiffs all individuals or entities that agree with their position. Indeed, plaintiffs thought that by going to the trouble of identifying and naming some 62 plaintiffs, when one would have sufficed, they would have demonstrated that a substantial portion of the Hopi Tribe shares their views.

did not have the authority to enter into the lease on behalf of the Hopi Tribe. The plaintiffs rely on the Hopi Constitution and By-laws which, they claim, specifically withheld the power to lease or dispose of Hopi lands.

Both the Secretary of the Interior and the Tribal council also concluded that the Tribal Council had not been delegated leasing authority from the Tribe (App. 61a-66a). However, invoking Article VI, section 3 (App. 38a *supra*, p. 11) of the Hopi Constitution and at the Council's request, the Secretary purported to delegate authority to enter into mineral leases to the Hopi Tribal Council. (App. 63a-66a.) The validity of the Secretary's approval of the Black Mesa lease thus turns on the validity of this purported delegation.[8] This purported delegation demonstrates that the Secretary was not a passive observer merely rubber-stamping his approval of the lease. The Secretary's role was pivotal. Without the purported delegation, there would not have been a Black Mesa lease.

In their second cause of action (App. 21a-23a) plaintiffs contend that when the Black Mesa lease was au-

[8] It is clear that the Secretary committed a gross error. Article VI, section 4 of the Hopi Constitution specifically provides that the Hopi Tribe retains all powers not "*expressly*" delegated to the Tribal Council. Pursuant to Article VI, section 3 the Tribal Council is authorized to exercise such further powers as may in the future be delegated to it by the Secretary, the Tribe or anyone else. This provision obviously contemplates that these persons or entities could delegate his or its powers to the Council. But the Secretary does not have the power to lease tribal lands in the first instance. 25 U.S.C. § 396a; Poafpybitty v. Skelly Oil Co., 390 U.S. 365 (1968); Mott v. United States, 283 U.S. 747 (1931). Obviously, the Secretary could not validly delegate to the Council a power that he could not validly exercise himself.

thorized by the Council, several of its members had not been certified by the Kikmongwis of their respective villages as required by Article IV, section 4. Of the 18 Council seats, only 11 were filled and of these only 6 or 7 were properly certified.[9] Therefore, at the time the Black Mesa lease was authorized by the Council, there was no quorum as defined by Article IV, section 6 of the Hopi Constitution and the Secretary of the Interior acted illegally in approving any actions taken at that meeting.[10]

The complaint's third cause of action (App. 24a-25a) alleges in general that the Secretary acted arbitrarily, capriciously and abused his discretion in the manner in which he has administered Hopi affairs and his obligations to the plaintiffs under the United States and Hopi Constitutions and that he has engaged in a pattern and practice of discriminating against one faction of Hopis in favor of another. It is further alleged that the Secretary's arbitrary and capricious conduct has resulted in the execution and approval of the Black Mesa strip mining lease. This cause of action is the least developed in terms of documentation and discovery of relevant records. It obviously draws in part on the substantiated allegations of the first and second causes of action.

[9] Most of these allegations have been admitted by the Secretary of the Interior in discovery conducted prior to the district court's dismissal. *See* R.O.A., vol. 3, pp. 558-560, 750 and 751.

[10] Article IV, section 6 provides: "No business shall be done unless at least a majority of the members are present." This means that if there are 18 seats on the Council, a majority, or 10, is required to conduct business. *See* Federal Trade Commission v. Flotill Products, 389 U.S. 179 (1967).

D. Procedural History

The defendants and the intervenors moved to dismiss this case on several grounds (R.O.A., vol. 1, pp. 111 *et seq.*, 166 *et seq.*, and vol 2, pp. 338 *et seq.*) while the plaintiffs moved for summary judgment on their first cause of action. (R.O.A., vol. 2, pp. 358 *et seq.*) Upon the motion of defendant Peabody (R.O.A., vol. 4, pp. 859 *et seq.*), the court ordered a briefing schedule and hearing limited to the motion to dismiss the complaint for failure to join the Navajo and Hopi Indian Tribes and the United States as indispensable parties (R.O.A., vol. 4, p. 1018). The plaintiffs then moved to join the United States and the Hopi Tribal Council as parties defendant and also moved to join the Navajo Tribe as a party, or, in the alternative, to give notice of the pendency of this action to the Navajo Tribe (App. 67a-71a).[11] The plaintiffs' joinder motions, which were not mentioned by the court of appeals, alleged that the Hopi and Navajo Tribes and the United States were not indispensable parties. The plaintiffs requested that the joinder order provide that the action would proceed in the absence of the Hopi and Navajo Tribes and the United States if they were unwilling to join.

On February 16, 1973, the District Court entered its order (App. 7a-9a) denying the plaintiffs' motion to

[11] The interest of the Navajo Tribe arises by virtue of its joint ownership with the Hopi Tribe of the area covered by the Black Mesa lease. *See* Healing v. Jones, 210 F.Supp 125 (D. Ariz. 1962), *aff'd* 373 U.S. 758 (1963). The Navajos executed a separate lease with Peabody's predecessor which is not at issue in this litigation.

join and dismissing the complaint for failure to join indispensable parties.[12]

On appeal, the Court of Appeals for the Ninth Circuit affirmed, holding that the Hopi Tribe was an indispensable party which could not be joined because of its sovereign immunity. It specifically declined to reach the alleged indispensability and sovereign immunity of the Navajo Tribe and the United States. (App. 2a.)[13]

REASONS FOR GRANTING THE WRIT

The Hopi Tribal Council was supposed to be the servant of the Hopi Indians, but by the distorted reasoning of the courts below, it has been transformed into their absolute master. The lower courts held, though their opinions do not even acknowledge it, that the rights granted, recognized or protected by the Hopi Constitution are as fragile as the paper on which they are written for they can be violated with impunity by

[12] Though it is far from clear, the district court's order may also have been based on the alternative ground of laches. (App 8a-9a.) Laches had not been raised in any of the defendants' or intervenors' motions to dismiss and the court had issued an order that specifically limited the briefing and the hearing on the motion to dismiss to the indispensable party issue. Consequently, the district court's finding the plaintiffs guilty of laches clearly constituted a denial of due process of law. Morrissey v. Brewer, 408 U.S. 471 (1972); Dodd v. Spokane County, Wash., 393 F.2d 330 (9th Cir. 1968). This is especially true since the very nature of the laches defense clearly requires an opportunity for an evidentiary hearing. Czaplicki v. S.S. Hoegh Silvercloud, 351 U.S. 525 (1956); Powell v. Zuckert, 366 F.2d 634 (D.C. Cir. 1966).

[13] Hence ,the only questions raised in this petition concern the alleged indispensabilty and sovereign immunity of the Hopi Tribe. If this Court should grant the petition for a writ of certiorari and reverse, the Ninth Circuit would then be called upon to rule on the issues that it left undecided, including laches.

the Hopi Tribal Council. The decisions below must also be taken to hold, again *sub silentio*, that though the Secretary exceeded his authority in approving the lease and violated the plaintiffs' rights in the process, there is no judicial remedy. It is as if American courts were powerless to grant relief to American citizens when the federal government ignores the Bill of Rights. Needless to say, concluding that Congress created remediless rights is not a result that is easily reached. [14]

The decision of the district court and the court of appeals are inconsistent with no fewer than four decisions of this Court, none of which was even mentioned in either opinion. *National Licorice Co.* v. *National Labor Relations Board*, 309 U.S. 350 (1940); *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102 (1968); *Heckman* v. *United States*, 224 U.S. 413 (1912); and *Ex Parte Republic of Peru*, 318 U.S. 578 (1943). Further, the decision of the court of appeals has created a conflict in the circuits on three important issues: whether federal courts can consider the merits of challenges to the legality of the Secretary of the Interior's action approving or implementing contracts with Indians despite the absence of the tribal signatories; [15] whether sovereign immunity can insulate the alleged *ultra vires* actions of the tribal officials from judicial review; [16] and whether sovereign immunity

[14] J. I. Case Co. v. Borak, 377 U.S. 426, 433-434 (1964); Bell v. Hood, 327 U.S. 678, 684 (1946).

[15] *Compare* the decision of the court of appeals below with Littell v. Morton, 445 F.2d 1207 (4th Cir. 1971) and Davis v. Morton, 469 F.2d 593 (10th Cir. 1972).

[16] *Compare* the decision below with Means v. Wilson, 522 F.2d 833 (8th Cir. 1975). *See also* White Mountain Apache Indian Tribe v. Shelley, 107 Ariz. 4, 480 P.2d 654 (1971) (*en banc*).

precludes the joinder of sovereign entities before that defense has been raised. [17] It does not properly analyze three of Rule 19(b)'s four factors. It nullifies virtually all of the provisions of the Hopi Constitution which were carefully drafted to preserve traditional Hopi ways until the Hopis themselves should vote for change. And it takes away from the Hopis and all other similarly situated American Indians their rights, as aggrieved persons, to judicial review of agency actions when their tribal councils refuse to participate in litigation.

For the reasons set forth in this Petition, most particularly the court of appeals' total disregard of four controlling decisions of this Court, the decision of the court of appeals is an apt candidate for summary reversal.

I.

THE ABSENCE OF A PARTY WHO CANNOT BE JOINED SHOULD NOT DEPRIVE AN AGGRIEVED PERSON OF HIS "RIGHT" TO JUDICIAL REVIEW UNDER THE ADMINISTRATIVE PROCEDURE ACT.

A. The Decisions Below Conflict with National Licorice.

The Administrative Procedure Act, 5 U.S.C. § 702, provides that "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, *is entitled* to judicial review thereof." (Emphasis added.) We are not aware of any other authority holding that the vital right afforded by this statute may be extinguished by the impossibility of

[17] Compare the decision below with Petrol Shipping Corp. v. Kingdom of Greece, Ministry of Commerce, 360 F.2d 103, 106 (2d Cir. 1966), *cert. denied*, 385 U.S. 931 (1967).

obtaining jurisdiction over an absent party. Certainly this Court has never sanctioned such a result

This Court held in *Tooahnippah* v. *Hickel*, 397 U.S. 598 (1970), that the Secretary of the Interior's approval of a disposition of Indian property is subject to judicial review under the Administrative Procedure Act. Though *Tooahnippah* involved the Secretary's approval of a will, whereas the subject of this case is his approval of a lease, there is no meaningful distinction between the two functions so far as judicial review under the Administrative Procedure Act is concerned. [18]

National Licorice Co. v. *NLRB, supra*, 309 U.S. 350, holds that the ordinary rules governing joinder of parties in private litigation do not apply in suits brought to protect or enforce public rights. *National Licorice* involved an order issued by the National Labor Relations Board which prohibited an employer from giving effect to contracts that he had entered into with his individual employees. This Court held that the order could be enforced despite the absence of the individual employees. The rationale was that absent parties to a contract are not regarded as indispensable to a suit to prevent its enforcement where the rights asserted by the plaintiffs arise independently of the

[18] In this case, the Secretary admitted that: "Prior to approving a lease of Indian tribal lands for mineral or other purposes, the Secretary of the Interior must be satisfied that the prospective lessor of tribal lands is an entity or individual with the legal authority to execute leases of tribal lands." (R.O.A., vol. 3, pp. 557 and 748.) Thus there is manifestly "law to apply" and the "narrow" exception to the Administrative Procedure Act for "agency actions committed to agency discretion by law" is plainly inapplicable. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410-413 (1971).

contract, particularly where they are founded upon the public laws of the United States.

> In a proceeding so narrowly restricted to the protection and enforcement of public rights, there is little scope or need for the traditional rules governing the joinder of parties in litigation determining private rights. Ordinarily where the rights involved in litigation arise upon a contract, courts refuse to adjudicate the rights of some of the parties to the contract if the others are not before it. [Citing, *inter alia, Shields* v. *Barrow*, 58 U.S. (17 How.) 130, 140.] Such a judgment or decree would be futile if rendered, since the contract rights asserted by those present in the litigation could neither be defined, aided nor enforced by a decree which did not bind those not present.
>
> But different considerations may apply even in private litigation where the rights asserted arise independently of any contract which an adverse party may have made with another, not a party to the suit, even though their assertion may affect the ability of the former to fulfill his contract. The rights asserted in the suit and those arising upon the contract are distinct and separate, so that the Court may, in a proper case, proceed to judgment without joining other parties to the contract, shaping its decree in such manner as to preserve the rights of those not before it [citations omitted].

National Licorice Co. v. *National Labor Relations Board, supra,* 309 U.S. at 363. As noted, in this passage this Court cited and distinguished the line of cases originating with *Shields* v. *Barrow,* 58 U.S. (17 How.) 130 (1855), on which the court of appeals rested its decision in this case.

This Court and others have paid unspoken allegiance to the principle of *National Licorice* in not applying strict joinder rules in suits seeking the enforcement of public rights. One recent example of this is *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402 (1971), in which the City of Memphis was not a party to a suit challenging the federal government's approval of the City's decision to build a highway through a City Park.[19] If all parties who stand to be affected by the outcome of suits challenging agency actions must be joined pursuant to Rule 19(a), much of that litigation would quickly become unmanageable, and if such parties are deemed indispensable, no single court could obtain jurisdiction over many such controversies.

The public rights that the plaintiffs seek to enforce in this action arise under the Hopi Constitution and By-laws, adopted by the Hopi Tribe and approved by the Secretary of the Interior pursuant to the Indian Reorganization Act, 25 U.S.C. § 476. They do not depend upon any provision, actual or potential, of the lease between the Hopi Tribe and the Peabody Coal Company or upon any action or failure to act of any of the parties in the performance of the contract. The plaintiffs claim that the Secretary exceeded his authority in approving the lease because the Hopi Tribe has not authorized the Hopi Tribal Council to lease tribal lands and because the Hopi Tribal Council which entered into the lease was not properly constituted. This case so clearly comes within *National Licorice*'s qualification to the rule of *Shields* v. *Barrow* that summary reversal is warranted on this basis alone.

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[19] The City of Memphis did participate in an *amicus curiae* capacity before this Court. *See* 28 L.Ed.2d at 924.

B. The Decisions Below Discriminate Against Indians.

The effect of the decisions below is to carve out a significant exception to the "generous" judicial review provisions of the Administrative Procedure Act.[20] Secretarial approvals of actions taken by Indian tribal councils are, under this view, shielded from review, even where Secretarial approval is required by Congress and is alleged to have been illegally given, unless the tribe itself brings the suit or consents to being joined. This inroad works a particular injustice on reservation Indians who probably have more need than anyone else to hold government and tribal officials accountable for their actions.[21]

The practical result of the court of appeals' decision is to permit the Secretary to hide his illegalities behind tribal entities, at least as long as they are willing to play along. But this Court has expressly held to the

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[20] *See* Abbott Laboratories v. Gardner, 387 U.S. 137, 140-1 (1967); Barlow v. Collins, 397 U.S. 159, 166-7 (1970); and Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971). The decision below runs counter not only to these recent decisions construing the Administrative Procedure Act but also to this Court's expansion of the concept of standing in actions against public officials to include non-economic injuries, *see* Sierra Club v. Morton, 405 U.S. 727, 738 (1972), and to Congress' efforts "to facilitate review by the Federal Courts of administrative actions." S. Rep. No. 1992, 87th Cong. 2d Sess., reprinted at 1962 U.S. Code Cong. & Admin. News 2784 at 2785, reporting on the bill, now 28 U.S.C. § 1391(e), that permits federal officials to be sued in any federal district court.

[21] *See, e.g.*, Note, "The Indian: The Forgotten American," 81 Harv. L. Rev. 1818 at 1820 (1968): "[A]lthough the normal expectation in American Society is that a private individual or group may do anything unless it is specifically prohibited by the government, it might be said that the normal expectation on the reservation is that the Indians may not do anything unless it is specifically permitted by the government."

contrary. The actions of tribal officials cannot insulate responsible government officials from being held accountable for violating their obligations to individual Indians. *Seminole Nation* v. *United States,* 316 U.S. 286, 295-301 (1942). In another context, this Court has not hesitated to declare invalid the *ultra vires* actions of an Indian tribal council which resulted in individual Indians illegally being subjected to state court jurisdiction. *Kennerly* v. *District Court,* 400 U.S. 423 (1971). *See also Pueblo of Santa Rosa* v. *Fall,* 273 U.S. 316 (1927). And this Court has recently emphasized that the rights of individual Indians, no less than tribal rights, must be protected and enforced. *McClanahan* v. *Arizona Tax Commission,* 411 U.S. 164, 181 (1972). *See also Morton* v. *Ruiz,* 415 U.S. 199, 236 (1974). Absolute deference to Indian tribal councils is particularly inappropriate where, as here, (1) the plaintiffs invoked specific provisions of their tribal constitution designed to protect them against possible excesses by their tribal council, (2) the federal government, acting through the Department of the Interior, specifically undertook to guarantee the plaintiffs' rights as set forth in the constitution (App. 45a), and (3) the alleged illegal actions resulted in the alienation of tribal property in which all tribal members have an undivided interest. Such deference and the resulting absence of accountability is particularly unjustified and unwarranted here. The effect of the challenged action of the Secretary was to amend unilaterally the Hopi Constitution by purporting to delegate to the Tribal Council leasing authority that was retained by the Tribe (*supra,* p. 14). The Secretary usurped the power that was specifically reserved to tribal members. (App. 38a, 40a-41a and 25 U.S.C. § 476.) If the Secretary of the Interior and Indian

tribal councils can collaborate in this way to repeal tribal constitutions, the protections that they afford to individual tribal members are worthless.

C. There Is a Conflict in the Circuits.

The decision of the Court of Appeals for the Ninth Circuit in this case conflicts with holdings of two other circuits in *Littell* v. *Morton,* 445 F.2d 1207 (4th Cir. 1971), *reversing Littell* v. *Hickel,* 314 F. Supp. 1176 (D. Md. 1970), and *Davis* v. *Morton,* 469 F.2d 593 (10th Cir. 1972). Both *Littell* and *Davis* held that federal courts could consider the merits of challenges to the legality of the Secretary of the Interior's actions approving or implementing contracts with Indians despite the absence of the tribal signatories.

Littell v. *Morton, supra,* was a suit by the former attorney of the Navajo Tribe against the Secretary of the Interior. Invoking the judicial review provisions of the Administrative Procedure Act, Mr. Littell challenged the Secretary's refusal to make certain payments claimed to be owed under the attorney's contract with the Tribe. The Court of Appeals for the Fourth Circuit reversed the district court's dismissal.

Littell presents a far more compelling case for a finding of indispensability than this case because (a) the rights sought to be enforced were private rather than public in nature; they arose under the contract between the Navajo Tribe and its attorney; (b) the suit necessarily involved an interpretation of the terms and provisions of that contract; and (c) the judgment would be satisfied out of tribal funds. Nevertheless, the suit proceeded in the absence of the Navajo Tribe and Mr. Littell was eventually successful. *Littell* v.

Morton, 369 F. Supp. 411 (D. Md. 1974), *aff'd,* 519 F.2d 1399 (4th Cir. 1975).

Davis v. *Morton, supra,* was a suit, also brought by non-Indians, to set aside the Secretary's approval of a lease between an Indian tribe and a development company, Sangre de Cristo. Neither the Indian lessor nor the non-Indian lessee was joined; yet the court of appeals ordered the district court to grant the relief sought on the grounds that the Secretary acted illegally in failing to comply with the National Environmental Policy Act. *See also Cady* v. *Morton,* —— F.2d —— (9th Cir. No. 74-1984, June 19, 1975). The indispensability and sovereign immunity issues were not specifically addressed in *Davis.*[22]

The only possible basis for distinguishing this case from *Littell* and *Davis* is that this case was brought by Indian plaintiffs, members of the Hopi Tribe, whereas

[22] Tewa Tesuque v. Morton, 498 F.2d 240 (10th Cir. 1974), *cert. denied,* 420 U.S. 962 (1975), is not to the contrary, for, unlike this case, it specifically reached the merits and held that the challenged actions of the federal officials "are within the outer perimeter of their authority." 498 F.2d at 243. Tewa Tesuque is therefore consistent with Littell and Davis in holding that the lawfulness of the Secretary of the Interior's approval or implementation of contracts or leases with Indan tribes can be reviewed under the Administrative Procedure Act in the absence of the tribal signatory. With regard to indispensability, Tewa Tesuque holds that the tribal lessor is an indispensable party to an action to cancel a tribal lease that is predicated on the specific terms and provisions of the lease or the performance (or lack thereof) under the lease, i.e., when it is based on private contractual rights rather than public rghts. Petitioners have no quarrel with that holding though it appears to be inconsistent with Littell. Tewa Tesuque, unlike this case, did not involve any claim that the tribal officials had exceeded their authority as defined under the tribal constitution. And this action, unlike Tewa Tesuque, does not seek cancellation of the underlying lease.

Littell and *Davis* were initiated by non-Indians. We fail to see any possible bearing of this racial distinction. It is true that the Hopi plaintiffs theoretically have available non-judicial tribal remedies, convincing the Tribal Council to change its ways and admit its errors or replacing its members at the next election. But non-Indians have similar remedies. The courts have not told environmental organizations to elect a new President or a new Congress or to replace the Governor of California or to convince the Secretary of the Interior to change his mind when they complain that state or federal officials are not complying with existing law. The Hopi Constitution can no more be discarded in favor of electoral or political reform than can the Bill of Rights, the Civil Rights Acts or the National Environmental Policy Act. Indians are citizens. They are entitled to the same judicial treatment as non-Indians.

Unless this conflict in the circuits is resolved, tribes and their counsel will be placed in an impossible quandry. If tribes are not indispensable in suits against the Secretary of the Interior, they probably would be well advised to participate voluntarily in litigation in order to insure that their interests are protected. That was the choice of the Crow Tribe in *Cady* v. *Morton, supra,* —— F.2d ——. On the other hand, if they can defeat the court's jurisdiction by remaining outside the litigation, they might choose that course. With the existing confusion and conflict, tribes are at a loss to know how their interests can best be protected.

II.

SOVEREIGN IMMUNITY DOES NOT PRECLUDE THE JOINDER OF THE HOPI TRIBAL COUNCIL.

A. The Denial of the Joinder Motions Conflicts with Decisions of This Court and the Courts of Appeals.

As noted in our Statement of the Case, the plaintiffs moved to join the Hopi Tribal Council and the United States and the Navajo Tribe but the motions were denied by the district court. The court of appeals affirmed this disposition *sub silentio* without even mentioning that joinder had been sought.

The district court's denial of the joinder motion was clear error. Rule 19(a) requires (it uses the word "shall") the joinder of persons who meet the requirements of the rule, are subject to service of process, and whose joinder will not deprive the court of jurisdiction. Sovereign immunity does not preclude joinder any more than it bars service of process. Once a sovereign entity is joined, it may properly raise the sovereign immunity defense, but it must be pleaded and it can be waived. Sovereign immunity can only be considered after the party is ordered joined and it has been raised as a defense. This Court so held in ***Ex parte Republic of Peru,*** 318 U.S. 578, 587-588 (1943), and several courts of appeals have followed suit. *Petrol Shipping Corp.* v. *Kingdom of Greece, Ministry of Commerce,* 360 F.2d 103, 106 (2d Cir. 1966), *cert. denied,* 385 U.S. 931 (1967); *Choctaw and Chickasaw Nations* v. *Seitz,* 193 F.2d 456 (10th Cir. 1951), *cert. denied,* 343 U.S. 919 (1952).

The district court's denial of the motion to join the Hopi Tribal Council, affirmed *sub silentio* by the court of appeals, is clearly and flatly inconsistent with these authorities. Since the Tribal Council could and should

have been joined, the dismissal predicated on the failure to join was plain error that must be reversed.

B. Sovereign Immunity Does Not Apply to Alleged Ultra Vires Actions of Tribal Officials: the Decision Below Conflicts with Another Court of Appeals Decision.

As we have just shown, the district court should have granted the plaintiffs' motion to join the Hopi Tribal Council. Consideration of the sovereign immunity defense was not appropriate until after the Council had been joined and raised the issue. But that objection aside, sovereign immunity does not have any application to the Hopi Tribe in this case for it cannot be invoked where, as here, plaintiffs alleged that the Hopi Tribal Council's execution of the Black Mesa lease was an illegal act, in excess of its authority.

It is, of course, well recognized that *ultra vires* actions of state or federal officials are not properly subject to the sovereign immunity defense. ***Ex Parte Young,*** 209 U.S. 123 (1908); *Larson* v. *Domestic & Foreign Commerce Corp.,* 337 U.S. 682 (1949); *Dugan* v. *Rank,* 372 U.S. 609 (1963); *Scheuer* v. *Rhodes,* 416 U.S. 232 (1974). There is absolutely no reason why the same rule should not apply to alleged *ultra vires* actions of tribal officials. Indeed it must. Actions that exceed an officer's authority are not actions of the sovereign. Here the plaintiffs alleged that the Hopi Tribal Council executed a lease in clear, blatant and flagrant violation of the restrictions on its delegated powers contained in the Hopi Constitution and By-laws. The decisions below mean that sovereign immunity insulates the *ultra vires* actions of tribal officials from judicial review even though, in the same circumstances, state and federal officials could and would be held accountable.

Both the Arizona Supreme Court and the Court of Appeals for the Eighth Circuit have held to the contrary. *White Mountain Apache Indian Tribe* v. *Shelley,* 107 Ariz. 4, 480 P.2d 654 (1971) (*en banc*); *Means* v. *Wilson,* 522 F.2d 833 (8th Cir. 1975). This issue and this conflict merit this Court's attention. The Nation's Indians are not favored by a decision which renders the actions of their tribal officials beyond judicial recourse.

III.

THE HOPI TRIBE IS NOT AN INDISPENSABLE PARTY.

A. An Indian Tribe Is Not an Indispensable Party Whe· Its Interests Are Being Fully and Adequately Represented by the United States or Its Officers.

Heckman v. *United States,* 224 U.S. 413, 444-446 (1912), holds that the Indian beneficial owners of land are not necessary or indispensable parties when the United States participates in litigation and fully and adequately represents their interests. *Heckman* was a suit to cancel conveyances executed by members of the Cherokee Tribe. Once again, the rule of *Shields* v. *Barrow* 58 U.S. (17 How.) 130 (1855), was specifically distinguished and held inapplicable. 224 U.S. at 444. The *Heckman* principle has been consistently followed in other Indian cases. *Cheyenne River Sioux Tribe of Indians* v. *United States,* 338 F.2d 906 (8th Cir. 1964), *cert. denied,* 382 U.S. 815 (1965); *Pan American Petroleum Corp.* v. *Udall,* 192 F. Supp. 626 (D.D.C. 1961). Of course, the same rule applies in non-Indian contexts. Where the trustee is capable of fully representing the interests of the beneficiary, the beneficiary is not an indispensable party. *See Kerrison* v. *Stewart,* 93 U.S. 155 (1876), on which both *Heckman* and *Pan American Petroleum* rely.

Here, the answer of the defendant Secretary of the Interior (R.O.A. vol. 1, pp. 97-104) leaves no doubt that whatever interest the Hopi Tribe or the Hopi Tribal Council might have in upholding the validity of the Secretary's approval of the Black Mesa lease is being vigorously asserted by their trustee. Therefore, under the *Heckman* rule, the Hopi Tribe is neither a necessary nor an indispensable party. Indeed, it is all the more appropriate that this suit be defended by the trustee since it is the Secretary's actions that are being challenged and it is the Secretary's actions which made the Black Mesa lease possible.

B. This Court's Leading Decision Interpreting the 1966 Amendments to Rule 19 Was Ignored by the Court Below: All Four Rule 19(b) Factors Plus Other Considerations Support a Finding of Non-indispensability.

Perhaps even more remarkable and less excusable than the court of appeals' failure even to mention, let alone attempt to distinguish, *National Licorice* or *Heckman* is its total disregard of the leading case interpreting the 1966 amendments to Rule 19, *Provident Tradesmens Bank & Trust Co.* v. *Patterson,* 390 U.S. 102 (1968). In two critical respects, the court of appeals' assessment of Rule 19(b)'s factors is directly at variance with *Provident Tradesmens Bank.*

1. The second factor.

The opinion of the court of appeals states (App. 5a): "The second factor, 'the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided', is simply not present in this case." Yet one of the means by which prejudice can be lessened or avoided is by the voluntary appearance by the absent

party. This avenue is specifically mentioned in the Advisory Committee's Notes to the 1966 revision of Rule 19:

> Sometimes the party is himself able to take measures to avoid prejudice . . . . [T]he absentee may sometimes be able to avert prejudice to himself by voluntarily appearing in the action or intervening on an ancillary basis [Citations omitted.] The court should consider whether this, in turn, would impose undue hardship on the absentee.[23]

Provident Tradesmens Bank underlines the importance of the availability of intervention. It teaches that the "purpose[ful] bypass[ing] of an adequate opportunity to intervene" should be counted heavily against a finding of indispensability because "any rights [of the absent party] have been lost by his own inaction." *Provident Tradesmens Bank, supra,* 390 U.S. at 114. Consequently, not only is the second factor present in this case, it strongly supports a finding of non-indispensability.

Following the leads of this Court in *Provident Tradesmens Bank* and the Advisory Committee's Notes, several lower courts have given considerable weight to the possibility of intervention in deciding not to regard the absent party as indispensable. *Natural Resources Defense Council* v. *Tennessee Valley Authority,* 340 F. Supp. 400 (S.D.N.Y. 1971), *rev'd on other grounds,* 459 F.2d 255 (2d Cir. 1972); *Smith* v. *American Federation of Musicians of U.S. & Can.,* 47 F.R.D. 152 (S.D.N.Y. 1969) and *Owatonna Manufacturing Co.* v. *Melroe Co.,* 301 F. Supp. 1296 (D. Minn. 1969). The failure of both lower courts even to consider the possibility of intervention is inexplicable.

[23] Quoted in 3A Moore's Federal Practice § 19.01 [5.-4] [1974 Ed.], 39 F.R.D. 89 at 92 and 28 U.S.C. Rule 19 at pp. 104, 106-107 [1972 Ed.].

2. The third factor.

As this Court noted in *Provident Tradesmens Bank, supra,* Rule 19(b)'s third factor, "whether a judgment rendered in the person's absence will be adequate," is puzzling. "Clearly the plaintiff, who himself chose the forum and the parties defendant, will not be heard to complain about the sufficiency of the relief obtainable against them." *Provident Tradesmens Bank, supra,* 390 U.S. at 111.[24] Moreover, if a court cannot grant adequate relief with the parties before it, the action should be dismissed pursuant to Rule 12 or 56, not Rule 19, and there would be no occasion to reach the indispensable party issue. *Bourdieu* v. *Pacific Western Oil Co.,* 299 U.S. 65 (1936). *See Provident Tradesmens Bank, supra,* 390 U.S. at 111, n. 7. For these reasons, this Court adopted an interpretation of Rule 19(b)'s third factor that is somewhat at variance with its literal language.

> [T]here remains the interest of the courts and the public in complete, consistent, and efficient settlement of controversies. We read the Rule's third criterion, whether the judgment issued in the absence of the nonjoined person will be 'adequate,' to refer to this public stake in settling disputes by wholes, *whenever possible.* . . .

Provident Tradesmens Bank, supra, 390 U.S. at 111 (emphasis added).

The court of appeals and the district court simply ignored this Court's analysis of the third factor—

[24] Here, as both Littell v. Morton, *supra,* and Davis v. Morton, *supra,* demonstrate, a judgment setting aside the Secretary's approval of the Black Mesa lease is plainly sufficient from the plaintiffs' standpoint.

treating it for all intents and purposes as identical to the first. Had it asked the correct question, whether the plaintiffs had done everything possible to settle this dispute by wholes rather than in parts, it would surely have answered in the affirmative. The only thing standing in the way of having all of the parties to the Black Mesa lease and all those interested in its performance in the same court at the same time is the refusal of the Hopi Tribal Council to participate voluntarily in this action. Surely that refusal should not be counted against the plaintiffs who have done everything within their power to bring the Tribal Council into court to account for its actions.

If the court of appeals had done nothing other than to consult and apply this Court's leading case interpreting Rule 19(b), it would have found, at a minimum, that three of its four criteria (numbers 2, 3 and 4) clearly support a finding of non-indispensability. That surely would have been enough to tip the balance in favor of providing the Hopi plaintiffs their day in court.

3. The fourth and first factors.

Rule 19(b)'s fourth factor, "whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder" has been regarded as the single most important consideration in its "equity and good conscience" test. *Cf. Bourdieu* v. *Pacific Western Oil Co.*, 299 U.S. 65, 71 (1936).[25] Virtually without exception,

[25] "We refer to the rule established by these authorities because it illustrates the diligence with which courts of equity will seek a way to adjudicate the merits of a case in the absence of interested parties that cannot be brought in." *Accord:* Stumpf v. Fidelity Gas Co., 294 F.2d 886, 891 (9th Cir. 1961); Rush & Halloran, Inc. v. Delaware Valley Financial Corp., 180 F. Supp. 63, 65-66 (E.D. Pa. 1960).

in all of the cases that have been dismissed for nonjoinder since the 1966 Amendments to Rule 19 and this Court's decision in *Provident Tradesmens Bank & Trust Co.* v. *Patterson, supra*, 390 U.S. 102, there was a finding that the plaintiff would have a remedy in another available forum. In such cases, "dismissal was really just a form of transfer of the action to a more appropriate forum." *Ferguson* v. *Thomas*, 430 F.2d 852, 860 (5th Cir. 1970), commenting on *Broussard* v. *Columbia Gulf Transmission Co.*, 398 F.2d 885 (5th Cir. 1968). Conversely, in virtually all cases decided since 1966 in which courts have refused to regard the absent party as indispensable, the lack of an alternate remedy figured prominently. *See, e.g., Bennie* v. *Pastor*, 393 F.2d 1 (10th Cir. 1968).[26]

When plaintiffs' "right" to judicial review under the Administrative Procedure Act is coupled with the absence of an alternate forum, the ability of the Hopi Tribe to intervene in this litigation, and the active participation of the trustee acting in behalf of its beneficiary, we think it is abundantly clear that the lower courts erred in dismissing for nonjoinder.

The lower courts also erred in their very superficial and mistaken analysis of the first factor, "to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties." Any judgment rendered in this case would not take away any coal from the Hopi Tribe or preclude the Hopi Tribe from entering into a lease with defendant

[26] *See also* Smith v. American Federation of Musicians of U.S. & Can., 47 F.R.D. 152 (S.D.N.Y. 1969); Gulf Ins. Co. v. Lane, 53 F.R.D. 107 (W.D. Okla. 1971); Levin v. Mississippi River Corp., 289 F. Supp. 353 (S.D.N.Y. 1968); Young v. United Steelworkers of America, 49 F.R.D. 74 (E.D. Pa. 1969); and Owatonna Manufacturing Co. v. Melroe Co., 301 F. Supp. 1296 (D. Minn. 1969).

Peabody or anyone else *provided only that the procedures required by the Hopi Constitution are followed.* In this respect this case is similar to, for example, *Natural Resources Defense Council* v. *Morton*, 458 F.2d 827 (D.C. Cir. 1972), enjoining the Department of the Interior from executing oil and gas leases for submerged government land pending compliance with applicable law, the National Environmental Policy Act of 1969 (NEPA), or *Davis* v. *Morton, supra,* 469 F.2d 593 (10th Cir. 1972), setting aside and enjoining the Secretary's approval of a major development lease of Indian lands pending compliance with applicable law, also NEPA, or *Wilderness Society* v. *Morton*, 479 F.2d 842 (1973) (*en banc*), *cert. denied*, 411 U.S. 917 (1973), enjoining the Secretary of the Interior from granting a right of way for the trans-Alaska oil pipeline which exceeded the width limitations of the Mineral Leasing Act of 1920, 30 U.S.C. § 185. These judgments do not take away the Indians' or the government's land or the anticipated benefits that flow from leasing the land or granting the right of way. They simply require compliance with applicable law before the lease or grant can be given effect. In the case of the Alaska pipeline, the defect could only be cured by Act of Congress. It was. Public Law 93-153, 87 Stat. 576.

Properly posed, the first factor requires analyzing and answering the following question: would a judgment requiring the Hopi Tribal Council to comply with the Hopi Constitution and By-laws prejudice the Hopi Tribe when the Tribe could, if it so desired, enter into a new lease after complying with the provisions of the Hopi Constitution? We fail to see how a judgment requiring compliance with its own organic governing document can be prejudicial to the Hopi Tribe. And if the plaintiffs should prevail and the Hopi Tribe

then refused to amend its constitution or to authorize a new lease, it would be an absurdity to suggest that the Tribe had been prejudiced by this action.

The opinon of the court of appeals makes two other obvious mistakes in its analysis of the first factor. (App. 5a.) Setting aside the Secretary's approval of the lease would not eliminate the employment of many of the Hopis. We are informed that few, if any, Hopis are employed at the Black Mesa mine. There is nothing to the contrary in the record on this motion to dismiss. And we fail to see how Peabody can be obligated to make royalty payments under the lease after (and assuming) the Secretary's approval is set aside by a court of competent jurisdiction when the Secretary's approval is a statutory prerequisite to the lease's validity. 25 U.S.C. § 396a. *See Davis* v. *Morton, supra.*

The decisions below amount to determinations by the lower courts that the Black Mesa lease is more important to the Hopi Tribe than the integrity of its tribal processes. But there is no reason why the Tribe cannot lease its coal, if it so desires, in a manner that complies with the requirements of the Hopi Constitution. And we are not aware of any other judicial pronouncement to the effect that governing law can be jettisoned in order to meet what appear to be the exigencies of the moment. All of the law in this nation of laws is *contra. Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952).

4. Other factors militate against dismissal.

The four specific factors enumerated in Rule 19(b) "are not intended to exclude other considerations which may be applicable in particular situations." Advisory Committee Notes, *supra*, quoted at 3A Moore's Federal

Practice, § 19.01 [5.-4] (1974 Ed.), 39 F.R.D. 89 at 92 and 28 U.S.C. Rule 19, at p. 106 (1972 Ed). There are several additional considerations that militate very strongly against dismissal. The plaintiffs have invoked the jurisdiction of a court of equity,[27] have alleged the infringement of public, as opposed to private, rights,[28] and have a Congressionally granted "right" to judicial review of the Secretary of the Interior's approval of the Black Mesa lease.[29] Further, dismissal for nonjoinder would render the specific, federally guaranteed protections of the Hopi Constitution a nullity.[30] But the additional factor that we deem particularly important is that the absent party's views and positions are *extremely* well represented by the existing parties. This consideration was also ignored by both lower courts. The federal government, Peabody, the Nation's largest coal producer, and six power companies are straining with all of the considerable resources at their command to uphold the validity of the Secretary's approval of the Black Mesa lease.[31] This is not an instance in which the absent party's views will not be adequately presented. Indeed, as previously shown, the presence of the absent party's trustee, standing alone, is a sufficient reason to deny the motion to dismiss for nonjoinder.

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[27] *See* Bourdieu v. Pacific Western Oil Co., *supra*, 299 U.S. at 70-71.

[28] *See* National Licorice Co. v. NLRB, *supra*, 309 U.S. at 363-364.

[29] *See* Tooahnippah v. Hickel, 397 U.S. 598 (1970).

[30] *See* Barlow v. Collins, 397 U.S. 159, 167 (1970).

[31] *See* Owatonna Manufacturing Co. v. Melroe Co., 301 F. Supp. 1296, 1305-1306 (D. Minn. 1969).

CONCLUSION

The refusal of the Hopi Tribal Council to participate voluntarily in this litigation must not be allowed to deprive the plaintiffs of their day in court. That would make the Council a law unto themselves. That would certainly be "an impotent outcome to negotiations . . . which seemed to promise more, and give the word of the nation for more." *United States* v. *Winans*, 198 U.S. 371, 380 (1905).

The Hopi Tribe is not an indispensable party in this litigation. The plaintiffs' motion to join the Hopi Tribal Council should have been granted. Sovereign immunity is not a defense to an action challenging alleged *ultra vires* actions of governmental officials. The decisions below are inconsistent with four decisions of this Court and create three conflicts with decisions of other circuits. For all of these reasons, the petition for a writ of certiorari should and must be granted and the decision below reversed.

In view of the multiple egregious errors of the court of appeals, petitioners respectfully suggest the appropriateness of granting the petition and remanding the case for reconsideration in light of:

1. *National Licorice Co.* v. *National Labor Relations Board*, 309 U.S. 350 (1940);
2. *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102 (1968);
3. *Heckman* v. *United States*, 224 U.S. 413 (1912);
4. *Ex Parte Republic of Peru*, 318 U.S. 578, 587-588, 589 (1943);

5. *Littell* v. *Morton*, 445 F.2d 1207 (4th Cir. 1971); and

6. *Means* v. *Wilson*, 522 F.2d 833 (8th Cir. 1975).

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